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Issue Date: 15 January 2003

CASE NO.: 2000-CAA-0020
2001-CAA-0009
2001-CAA-0011

In the Matter of:

MORTON E. CULLIGAN,
Complainant

v.

AMERICAN HEAVY LIFTING SHIPPING CO. (AHL), LINCOLN NYE, BOB SCHILLING, and MIKE C. HERIG,
Respondents in Case No. 2000-CAA-0020, and

AMERICAN HEAVY LIFTING SHIPPING CO. (AHL), INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS (MM & P), INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (ILA), TIMOTHY A. BROWN, and JAMES T. HOPKINS,
Respondents in Case Nos. 2001-CAA-0009 and 2001-CAA-0011.

Appearances:

For Complainant: Edward A. Slavin, Jr. Esq., St. Augustine, FL

For Respondent AHL: Leslie A. Lanusse, Esq., Frank Liantonio, Esq.
Adams and Reese, LLP, New Orleans, LA

For Respondent MM&P ("Union"): John A. Singleton, Esq.
Albertini, Singleton, Gendler & Darby, LLP, Baltimore, MD

RECOMMENDED DECISION AND ORDER

These proceedings arise under the employee protection provisions of the Clean Air Act, 42 U.S.C. § 7622 (hereafter "CAA"); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9610 (hereafter "CERCLA"); the Water Pollution Control Act, 33 U.S.C. § 1367 (hereafter "WPCA"); the Safe Drinking Water Act, 42 U.S.C. § 300j-9 (hereafter "SDWA"); the Solid Waste Disposal Act, 42 U.S.C. § 6971 (hereafter "SWDA"); and the Toxic Substances Control Act, 15 U.S.C. § 2622 (hereafter "TSCA") (hereafter collectively referred to

as the "environmental statutes" or the "Six Acts") (with implementing regulations appearing at 29 C.F.R. Part 24); and section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. § 660(c) (hereafter "OSH Act").[1] The pertinent provisions protect employees against discrimination for attempting to carry out the purposes of the environmental statutes of which they are a part, and they prevent employees from being retaliated against with regard to the terms and conditions of their employment for filing "whistleblowing" complaints or for taking other action relating to the fulfillment of environmental health and safety or other requirements of these statutes.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATEMENT OF THE CASE AND FACTS

Procedural Background/Jurisdictional Facts

1. Case No. 2000-CAA-0020

On or before May 4, 2000, Complainant Morton E. Culligan (hereafter "Complainant") called Mr. James Borders of the Jacksonville, Florida Occupational Safety and Health Administration (hereafter "OSHA") office alleging that his previous employer, AHL, terminated him after he reported several health and safety violations aboard THE MONSEIGNEUR, the ship he was employed aboard.[2] (ALJ 16). Mr. Borders informed Complainant that he would personally file the complaint via facsimile that night. (***Id.***). Mr. Borders memorialized Complainant's oral complaint on May 4, 2000, and faxed a letter to Mr. Arthur M. Johannes, advising Mr. Johannes that Complainant informed him that he wished to file a discrimination complaint against AHL.[3] (***Id.***). On May 22, 2000, the OSHA Regional Supervisor, Gerald T. Foster, sent Complainant a letter acknowledging receipt of his "complaint of discrimination under section 11(c) of the [OSH Act]," but informed Complainant that the complaints he raised were beyond the jurisdiction of OSHA's investigatory power. (RE 110A).

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[1] Amended Complaint ¶ 1. The SWDA is also knows as the Resource Conservation and Recovery Act, or RCRA, which Complainant references in his amended complaint.

[2] Complainant filed other complaints with the U.S. Coast Guard, concerning alleged unsafe and unhealthy working conditions on board the ship, and with the National Labor Relations Board, alleging discriminatory conduct undertaken by his union, the International Organization of Masters, Mates, & Pilots (MM & P). (***See*** ALJ 16;***see also*** RE 108A).

[3] Prior to contacting Mr. Borders, Complainant allegedly filed an on-line complaint on May 4, 2000 with the Occupational Safety and Health Administration (hereafter "OSHA"), which was forwarded to the Baton Rouge, Louisiana OSHA office the next day. (RE 108A). In his complaint, Complaint alleged that several safety hazards were present on THE MONSEIGNEUR, a large tanker owned by AHL. (***Id.***).

Complainant, through counsel, next wrote a letter to the then-Secretary of Labor dated June 20, 2000. Attached to the letter was Complainant's "amended complaint," in which he asserts that AHL illegally discharged him in response to his filing of internal health and safety complaints. (Amended Complaint ¶¶ 1, 3, 6). On June 27, 2000, Mr. Foster wrote to Ms. Eleanor Henneman of AHL to notify her that the Baton Rouge, Louisiana OSHA office received a complaint from Complainant against AHL (OSHA Case No. 6-0150-00-03). (ALJ 12). After investigating this matter, Mr. Foster informed Complainant and AHL through separate letters dated September 1, 2000 that the complaint was without merit and was being dismissed. (RE 45). Specifically, OSHA determined that the complaint was untimely, and it did not allege any violations of the Six Acts. (***See id.***). Complainant requested a full hearing before an administrative law judge (hereafter "ALJ") by letter of September 7, 2000, and the matter was assigned to the undersigned on September 18, 2000.

By a Notice of Assignment and Order of September 18, 2000, Complainant and AHL were instructed to provide the undersigned with written position statements on various preliminary issues, including the threshold jurisdictional issues, and whether remand to OSHA for further investigation (as requested by Complainant) was proper. AHL submitted a timely response and requested that Complainant's action be dismissed, arguing that this tribunal lacked subject matter jurisdiction over Complainant's action, as many of the complaints involved general workplace health and safety, not environmental concerns, and that even if jurisdiction existed, Complainant's complaint was untimely. (AHL Shipping Company's Response to the ALJ's Order of September 18, 2000 at 5-8 (Oct. 18, 2000)). The Department of Labor also submitted a response, arguing that the undersigned does have jurisdiction pursuant to 29 C.F.R. § 24.4(d)(2). (Sec'y of Labor's Response to Court's Order (Oct. 17, 2000)). Both the Department of Labor and AHL agreed that remand was unnecessary and improper. Complainant did not file a formal brief addressing these issues, but submitted a copy of a May 4, 2000 letter memorializing the conversation Complainant had with OSHA, now part of the record as ALJ 16, as a partial response to the September 18, 2000 Order. (Complainant's Notice of Filing in Response to Court's Order (Sept. 20, 2000)). On November 2, 2000, I issued an Order advising all parties that at least a portion of Complainant's complaints gave rise to colorable actions under the environmental statutes cited by Complainant and, as a result, the tribunal possesses jurisdiction over this matter. Additionally, I determined that Complainant's initial oral complaint was timely, that remand for further investigation by OSHA was inappropriate, and that the parties should continue to proceed with discovery. Thereafter, various discovery disputes were resolved by the undersigned. [4]

On August 23, 2001, Complainant filed Complainant's First Motion *In Limine* and Associated Motion for Protective Order (hereafter "Motion *In Limine*"), in which he requested that all evidence developed regarding Complainant's pre-AHL employment and other

[4] During the course of the protracted discovery phase of this case, the parties filed motions requesting relief and assistance from this tribunal regarding various discovery issues. All of these motions were addressed in my pretrial Orders, and I decline to rehash the particulars concerning the substance of these motions or my rulings, except as discussed below.

administrative complaints filed by Complainant be excluded from trial, and, further, that Respondents be barred from disclosing and/or distributing any such information to individuals not working in connection with Complainant's claim. AHL opposed this motion in all respects by memorandum filed with this tribunal on September 4, 2001, arguing that the evidence is indicative of habit and character or, alternatively, relevant to Complainant's lost wages claim and can be used as impeachment evidence.

On November 1, 2001, the undersigned issued an Order of Consolidation, Sixth Order Concerning Discovery, Order on Pending Motions, and Order to Show Cause (hereafter "Sixth Order"), in which this case was consolidated with Case Nos. 2001-CAA-0009 and 2001-CAA-0011.[5] Also, Complainant's Motion *In Limine* was denied, as the aforementioned evidence was relevant to issues addressing Complainant's inability to find subsequent employment and his related lost wages claim, and potentially relevant as impeachment evidence. However, I rejected AHL's contention that evidence concerning Complainant's prior work history could be used to establish habit or character. Finally, I ordered MM & P to show why default judgment should not be entered against it regarding Case No. 2001-CAA-0009, as requested by Complainant's counsel during an October 23, 2001 conference call held between the undersigned, her law clerk, and counsel for Complainant and AHL. MM & P submitted a timely response on November 29, 2001, which the undesigned deemed sufficient to respond to the show cause order. (***See*** Order Concerning Complainant's Motions to Strike Improper Defenses and Motion for Partial Summary Judgment Against MM & P Respondents (Jan. 28, 2002)).

MM & P included in its November 29, 2001 response a Motion to Dismiss, asserting that Complainant's complaint alleges the same facts and issues raised in his complaint before the National Labor Relations Board (hereafter "NLRB") against MM & P and, as a result, the principles of ***res judicata*** and collateral estoppel bar Complainant's action to the extent that it is against MM & P. Complainant opposed the motion in full, stating that the aforementioned legal principles are inapplicable.[6] MM & P's Motion to Dismiss was denied without prejudice, as neither legal principle was appropriate in this case. (Order Concerning Complainant's Motions to Strike Improper Defenses and Motion for Partial Summary Judgment Against MM & P Respondents (Jan. 28, 2002)).

All parties were notified that a hearing on the above-captioned consolidated cases would be held from April 8, 2002 to April 12, 2002 in Orlando, Florida by my Notice of Hearing and Order of February 6, 2002.

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[5] I also denied Complainant's motion for remand to OSHA for further investigation that was pending in Case Nos. 2001-CAA-0009 and 2001-CAA-0011 in my Sixth Order.

[6] Complainant also requested partial summary judgment on various issues involving MM & P, a request that was denied in my January 28, 2002 Order.

Shortly before the hearing, on March 26, 2002, AHL filed a Motion for Summary Decision arguing that summary judgment was appropriate because this tribunal lacked subject matter jurisdiction to hear this matter and that Complainant could not rebut the fact that he was terminated for legitimate, nondiscriminatory reasons completely unrelated to his alleged protected activities.[7] Complainant opposed AHL's Motion for Summary Decision in all respects on March 27, 2002, stating that the Motion to Dismiss was untimely, as it was filed less than twenty days prior to the start of the hearing (citing 29 C.F.R. § 18.40(a)). AHL replied that while its motion was technically untimely, such error was ***de minimis***, as no party would be prejudiced by the filing and adequate time was provided to Complainant to submit a full response. By Order Denying Summary Decision of April 1, 2002, I denied AHL's Motion for Summary Decision, finding that, notwithstanding the timeliness issue, the Motion for Summary Decision failed on its merits.

2. Case No. 2001-CAA-0009

On December 5, 2000, Complainant filed a complaint (OSHA Case No. 6-0150-01-801) with the Dallas, Texas OSHA office against AHL, MM & P, ILA, Timothy Brown, and James T. Hopkins, alleging that these respondents retaliated against him in the form of expelling him from the union effective November 30, 2000, in part due to Complainant's pursuit of his action against AHL, Case No. 2000-CAA-0020. (RE 46). The complaint was investigated by OSHA and denied by Final Investigative Report dated March 20, 2001. (RE 46). All parties were notified that OSHA determined that the complaint had no merit via separate letters from Mr. Foster dated April 9, 2001. Complainant requested a formal hearing before this tribunal on this matter on April 17, 2001. In addition to requesting a hearing, Complainant made a motion for this case to be consolidated with Case No. 2000-CAA-0020. On April 25, 2001, I issued a Notice of Assignment, Stay of Proceedings, and Order, which instructed all parties to submit briefs stating their position on Complainant's motion for consolidation and advised that further action on this particular matter would be stayed until the preliminary issues were resolved. No party opposed the motion for consolidation, and the motion was granted by the undersigned's Order of Consolidation, Sixth Order Concerning Discovery, Order on Pending Motions, and Order to Show Cause of November 1, 2001. Once consolidated, the case proceeded as described above.

3. Case No. 2001-CAA-0011

Complainant filed this complaint (OSHA Case No. 6-0150-01-802) with the Secretary of Labor via facsimile on April 4, 2001 complaining of alleged retaliation by AHL in the form of "hardball litigation tactics." After investigating the matter, the Dallas, Texas OSHA office issued a letter notifying Complainant and AHL that the OSHA office was "jurisdictionally pre-empted from any attempt to effect a resolution of [these] allegations" due to the fact that the allegations comprised identical claims that were, at the time, pending before the undersigned. On May 14, 2001, Complainant requested a full hearing before an ALJ on this matter, and simultaneously requested that the case be consolidated with Case No. 2000-CAA-0020. The undersigned issued a

[7] AHL also argued that it was entitled to summary judgment on the other two cases.

Notice of Assignment, Stay of Proceedings, and Order on April 25, 2001, and the case was consolidated with Case Nos. 2000-CAA-0020 and 2001-CAA-0009 on November 1, 2001 through my Order of Consolidation, Sixth Order Concerning Discovery, Order on Pending Motions, and Order to Show Cause. Once consolidated, the case proceeded as described above.

Record of Hearing/Evidence

A hearing in these consolidated cases was held in Orlando, Florida from April 8 to April 12, 2002.[8] The parties were represented by counsel and received a full and fair opportunity to present evidence and arguments. At the hearing, the following witnesses testified, all of whom proved to be credible: Mr. Lincoln H. Nye, chief engineer aboard THE MONSEIGNEUR (Tr. at 54-270, 327-413); Mr. Richard D. Horner, president and chief executive officer of AHL (Tr. at 414-615); Mr. Timothy A. Brown, president of MM & P (Tr. at 617-694); Captain Michael C. Herig, captain of THE MONSEIGNEUR (Tr. at 711-1094); Ms. Sue Ellen Bourcq, port representative for MM & P at the Port of New Orleans (Tr. at 1101-1175); and Complainant (Tr. at 1175-1610).

The following exhibits were offered and received during the course of the five day hearing or through the undersigned's post-hearing Order Granting, in Part, Denying, in Part, Complainant's Motion to Exclude of June 27, 2002: ALJ 1-13, 15, 16, and 18-20;[9] CX 1, 2A, 3B, 4-12, 19, 21A, 21B, 21D, 21E, 21F, 21G, 22, 27, 28, 30A, 30, 30C, 31, 32, 32A, 32B, and 33; RE 1, 2, 5-10, 10A, 11, 12, 38, 39, 45, 46, 49-51, 56-58, 60-64, 66, 67, 72-97, 101, 102A, 104-110, 108A, and 110A; and RU 1-29.[10] As noted below, ALJ 14, ALJ 17, CX 3A, and CX 20 are now being admitted.

A review of the entire hearing transcript reveals that the Non-Conformity Action Reports (hereafter "NCARs") completed by Complainant, located at CX 3A and RE 13-36, may not have been formally admitted into evidence. While both the undersigned's own notes and page four of

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[8] References to the hearing transcript appear as "Tr." followed by the applicable page number(s). Exhibits offered by Complainant, the Respondent-Employer (AHL), the Respondent-Union (MM & P), and the undersigned administrative law judge will be referred to as "CX," "RE," "RU," and "ALJ", respectively, followed by the exhibit number.

[9] ALJ 14 and 17, which were marked but not formally offered and admitted, are identical to CX 32A and RE 10A, respectively. They are now being admitted for ease of reference.

[10] As part of its post-hearing evidentiary submissions, AHL request that several exhibits touching upon the timeliness and jurisdiction issues be admitted. However, AHL assigned some of these exhibits numbers that overlapped with several exhibits admitted at the hearing. In my June 27, 2002 Order, I distinguished certain post-hearing exhibits marked as "RE 105" through "RE 114" and introduced under cover letter of June 11, 2002 from those submitted under cover letters of April 17 and 26, 2002 by adding an "A" to the number. Except for RE 108A and 110A (and RE 107A and 113A, which were already in the record as ALJ 16 and RU 3), these exhibits were rejected.

the transcript (listing all of the exhibits identified and received) reflect that CX 3A was admitted on the first day of the hearing, the pages of the official hearing transcript corresponding to those appearing within the page four exhibit list do not show CX 3A being identified or admitted. To the extent that the record shows CX 3A not being admitted, it was clearly the intent of the parties and of this tribunal to include this exhibit in the record and no party will be prejudiced thereby.[11] Similarly, CX 20, which consists of sixteen pictures taken by Complainant, was not formally admitted during the course of the proceedings, as questions surrounding foundational issues existed at the time CX 20 was first introduced.[12] (Tr. at 78-91). Counsel for Complainant assured this tribunal that all foundational questions would be resolved through Complainant's testimony. (Tr. at 221-22). While Complainant provided sufficient testimony to any foundational issues concerning CX 20, the exhibit was not formally admitted into the record. Like CX 3A, no party will incur any prejudice if CX 20 is admitted at this stage. Accordingly, ALJ 14, ALJ 17, CX 3A, and CX 20 are hereby admitted into evidence. **SO ORDERED**.

Upon conclusion of the hearing, the record was held open for a period of sixty days for the limited purposes of allowing the parties to submit ***de bene esse*** depositions of the individually named parties who were not present at the hearing, as well as to submit evidence relating solely to the jurisdictional and timeliness issues raised in these claims, and complete copies of several exhibits admitted during the hearing. (***See*** Tr. at 10-53, 703, 1612-13, 1619-20; ***see also*** Order Granting, in Part, Denying, in Part, Complainant's Motion to Exclude (June 27, 2002)). In addition, a briefing schedule was outlined at the conclusion of the hearing to establish a framework for the submission of the parties' proposed findings and conclusions. All parties submitted timely post-hearing briefs.[13] Further, all outstanding evidentiary issues were resolved by the undersigned's Order Granting, in Part, Denying, in Part, Complainant's Motion to Exclude of June 27, 2002, which resulted in RE 45, 46, 105-110 (complete copies of CX 6, 9-11, 27, and 29, respectively),[14] 108A, and 110A all being admitted. The record is now closed and the findings of

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[11] As RE 13-36 are identical to the twenty-four pages comprising CX 3A, it is unnecessary to separately admit them.

[12] CX 20 consists of two different sets of photographs, which are distinguishable by the size of the photos. There are thirteen smaller photos numbered one to thirteen, and three larger sized pictures numbered one to three. To avoid confusion due to the overlapping numbers, it was determined that the large pictures would be referred to as "large [insert photo number]," and the smaller pictures referred to according to the number only. (Tr. at 91).

[13] After filing his rebuttal brief, Complainant filed three "Supplemental Citations" with this office, all via facsimile. Complainant filed the first Supplemental Citation on September 30, 2002, and the other two on October 7, 2002. All three supplemental citations have been accepted and considered.

[14] Although CX 27 was admitted at trial (Tr. 233), CX 29 was apparently not offered. However, complete copies of CX 27 and 29 were admitted as RE 109 and 110 by the June 27, 2002 Order. (The final page of the Order incorrectly referenced CX 27 as CX 17.)

fact and conclusions of law detailed herein are based solely on the testimony and evidence admitted at the hearing or posthearing.

Factual Background

Complainant began working in the maritime industry in 1979, when he was hired as a motorman in the engine room of the OCEAN PATRIOT for an ocean drilling exploration company.[15] (Tr. at 1184-86). Complainant's post-1979 employment, all of which was in the maritime field, required him to work primarily as an engine room operator aboard a number of different types of vessels all over the world. (***See*** Tr. at 1189-90). In the 1990s, Complainant worked for several maritime employers, including Trico Marine, Diamond Offshore, Atwood Oceanics, Gulf Coast Transit, and Trinity Management Group. (***See*** Tr. at 1464-91, 1542).

Complainant began working for AHL aboard THE MONSEIGNEUR, a large cargo ship designed to carry chemicals and petroleum products, on January 18, 2000, and was employed as the ship's third assistant engineer.[16] (Tr. at 60, 1184, 1376). Complainant was ultimately relieved of his duties on April 14, 2000 and, thus, worked for a total of eighty-eight days as a third assistant engineer aboard THE MONSEIGNEUR. (Tr. at 1179, 1376). During this term of employment, Complainant worked entirely as a third assistant engineer, the first time in his career that he held an officer's position.[17] (***See, e.g.***, Tr. at 55, 1178, 1376). As a third assistant engineer, Complainant was responsible for overseeing the engine room watches while on duty, which included duties such as making rounds, maintaining and repairing all equipment and systems located in the engine room, and directly supervising Victor Archangeles, Edgar Flores, and Chris Hilley, the three watch engineers (or "QMEDs").[18] (***See, e.g.,*** Tr. at 59, 160-61, 184-89, 240-42, 278, 336-38, 951, 1211-12, 1377, 1385; CX 8, CX 28). On a typical day, Complainant would work two watches in the engine room. (Tr. at 1541). Complainant was directly supervised by the Chief Engineers Scott

[15] Previously, Complainant worked as a jet engine mechanic aboard the USS FORESTAL for the U.S. Navy from the late 1960s to June, 1970. (Tr. at 1184).

[16] THE MONSEIGNEUR was originally owned by Gulf Oil Co. and named THE GULF SOLAR. After AHL purchased the ship, it was re-christened THE MONSEIGNEUR. (Tr. at 1201-03).

[17] Complainant previously worked for AHL from 1991 to 1995, serving as an engine room employee, a non-supervisory position, aboard four different AHL-owned vessels. (Tr. at 510, 1201).

[18] QMED is an acronym for Qualified Member, Engineering Department. Each watch consists of one QMED and one supervisory engineer. (Tr. at 934).

DePersis and Nye,[19] First Assistant Engineers Robert Schilling and Bernie Fogg,[20] and Second Assistant Engineers Joe Kasny and Jimmy Carroll, all of whom possessed authority to issue orders to Complainant as well as his subordinates. (***See*** Tr. at 55, 160, 317-19, 950-52, 1377, 1380). Capt. Herig, who was THE MONSEIGNEUR's captain during most of the period that Complainant was on the ship, was responsible for supervising all of the ship's personnel. (Tr. at 724, 948-49, 1008, 1377, 1380). All crew members were expected to abide by the chain of command while aboard THE MONSEIGNEUR, which is designed to maintain a sense of order among the crew. (Tr. at 57-58, 483, 746).

Upon joining the crew of THE MONSEIGNEUR, Complainant was given a number of documents introducing him to certain procedures and responsibilities new employees were expected to learn and follow, including how to recognize certain safety alarms and how to file NCARs, which are complaints addressing conditions on the ship that do not comply with appropriate safety standards, or suggestions as to how to improve on-ship safety.[21] (Tr. at 58, 1205; CX 5). Complainant was also provided copies of AHL's engineering and safety policies, as well as access to manuals specifically addressing engine room work, all of which Complainant read and understood. (***See*** Tr. at 1206; ***see also*** Tr. at 954-55). Complainant testified that he read most of these materials while down in the engine room on duty. (***See*** Tr. at 1381, 1384-85). Complainant acknowledged that as part of his duties, he was expected to follow any orders handed down by the chief engineer to either him or the QMEDs, and that he and his fellow co-workers were expected to treat each other with respect and consideration. (Tr. at 1386-87, 1397-1400). Finally, all of THE MONSEIGNEUR's crew were expected to maintain a "professional demeanor" when in the presence of AHL's customers. (***See*** Tr. at 1400-01).

Upon commencing work aboard THE MONSEIGNEUR, Complainant testified that he was "surprised" and "shocked" at the working conditions in the engine room, as he observed what he perceived to be several unsafe working conditions. Complainant corrected many of these problems himself, but observed other problems aboard the ship. (Tr. at 1208, 1216). As an example, Complainant testified that when he visited the pump room, he noticed that the main valve's ballast pump was not adequately oiled, causing the machine to overheat and burn off the surface paint in several locations. (Tr. at 1216-17). Further immediate inspection revealed that overspeed and oil

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[19] When Complainant joined the crew of THE MONSEIGNEUR, Scott DePersis was the Chief Engineer, but Chief Engineer Nye, who was on vacation, returned to the ship March 19, 2000 and relieved Chief Engineer DePersis. (***See*** Tr. at 113, 797-98, 265-66, 270, 956).

[20] First Assistant Engineer Fogg replaced First Assistant Engineer Schilling during the course of Complainant's employment aboard THE MONSEIGNEUR. (Tr. at 956).

[21] The NCAR filing procedure typically starts with a written complaint or suggestion submitted to the ship's safety board, which then reviews it and determines if it has merit. If the complaint/suggestion is determined to be meritorious, it is then forwarded to the company's safety office for further review. (Tr. at 130, 331-32, 604; ***see also*** CX 9).

pressure shut down systems were missing, but Complainant "found more and more things wrong with" the pump the longer he was aboard the ship. (Tr. at 1217-18, 1228-30). While none of these problems caused any catastrophic problems, on February 5, 2000, an oil line attached to the ballast pump burst, resulting in the bilge area being covered by oil. (Tr. at 356, 1220, 1257). A co-worker, though, arrived in time to assist Complainant in fixing this problem before too much oil leaked, as the longer the pipe bled, the greater the potential for oil to be discharged into the ocean through the bilge system.[22] (***See*** Tr. at 1225). Complainant also testified that the marine sanitation device was not functioning properly, which was causing sewage to be discharged into the ocean before it was purified, but he fixed this problem early on into his hitch as well. (Tr. at 1213-16). Complainant attributed these situations to the fact that some of the machinery being used was "old and decrepit," and testified that, in his opinion, general maintenance and safety was lax aboard the ship. (***See*** Tr. at 1219-23, 1226-27, 1230-32, 1394; ***see also*** Tr. at 1260).

As Complainant's hitch progressed, he stated that he observed more problems aboard the ship involving the ballast pump or other machinery or systems, and either fixed the problem himself or notified a supervisor, who took measures to correct the problem. (***See***, ***e.g.***, Tr. at 357, 1217; ***see also*** Tr. at 1223, 1457; CX 3A). For instance, Complainant discovered that the lifeboat engines were not operating properly due to the fuel lines being rusted, and that the fire foam pump, which is used to extinguish on-board fires, was malfunctioning.[23] (Tr. at 1226, 1258-59). In both cases, Complainant notified his superiors and they attended to the problems quickly. (***See*** Tr. at 1226, 1440-46). Nevertheless, as a result of Complainant's findings, he was determined to maintain his watch in a vigilant and efficient manner to ensure the safety of the ship and its crew. (***See***, ***e.g.***, Tr. at 1232).

In addition to testifying to the deficient working conditions aboard THE MONSEIGNEUR, Complainant also testified that he was instructed by his superior officers to illegally discharge improper materials into the ocean. In early February, Complainant testified that First Assistant Engineer Schilling instructed him to throw several bags of garbage that he believed to contain a variety of non-biodegradable items, such as paint chips and plastic, over the side of the

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[22] According to Complainant, this was the only time that an accident involving a pipe breaking occurred during his eighty-eight days aboard the ship, and that this incident was recorded in the log book. (***See*** Tr. at 356, 1392).

[23] Checking the life boats and the foam system were not part of Complainant's regular duties, as these items were located outside the engine room. (Tr. at 364, 366-67, 1433, 1437-46, 1539; ***see also*** CX 8). The log book entries covering the period between March 14, 2000 to April 11, 2000 do not indicate any problems with these systems, with the exception of the April 8, 2000 entry showing that a twelve-volt battery was changed in the port life boat. (Tr. at 352, 364-76, 1437-38). Capt. Herig also testified that soon after rejoining the ship's crew, the chief engineer advised him that there was "some trouble with the [life] boat," but that the problem had been attended to, as the necessary parts were ordered once the problem was detected. (Tr. at 195, 725).

ship on several consecutive nights.[24] (Tr. at 778, 1237; ***see generally*** RE 8). Complainant refused to perform this task each time, but claims that other members of the crew did dispose of this type of trash in this manner. (***See*** Tr. at 1238-43). Complainant openly complained about First Assistant Engineer Schilling's order to Capt. Herig in the mess hall on February 2, 2000, and Capt. Herig actually witnessed a verbal confrontation between Complainant and First Assistant Engineer Schilling relating to the "garbage" order, as well as the "wash down" incident, described below. (Tr. at 774, 777, 957-58, 964-67; RE 8). Capt. Herig testified that Complainant was visibly upset and fairly disrespectful when talking to him in the mess hall, and he spoke to Complainant about this incident.[25] (Tr. at 957-58).

Ultimately, Complainant recorded this incident in the log book, which is the official record of all activities occurring in the engine room. (Tr. at 112, 354-55, 1238, 1242; ***see also*** CX 30A). These log book entries were scratched out the next day by First Assistant Engineer Schilling, who also instructed Complainant not to record such incidents in the log book. (Tr. at 1242-45; CX 30A). As a result of his log book entry, though, Complainant believes that, in retaliation, First Assistant Engineer Schilling hosed down the engine room, spraying water on him and a coworker, while the ship was running. (Tr. at 1245-47).

Complainant recorded this "wash down" incident in the log book as well, an entry that Chief Engineer DePersis scratched out the next day. (Tr. at 1249; CX 30B). Following these two log book incidents, Chief Engineer DePersis, Complainant, and Capt. Herig met in the captain's office to discuss Complainant's improper log entries, where Complainant was instructed to only put "appropriate" comments in the log book.[26] (***See*** Tr. at 795, 1249-51, 1256). Capt. Herig further explained to Complainant that he should follow the NCAR reporting procedure if he wished to report a nonconformity. (Tr. at 810, 812, 962; RE 9).

Complainant further testified that he was instructed on one occasion to punch holes in the sides of several oil drums and throw them overboard, which he refused to do, as he did not believe that the barrels were properly cleaned. (Tr. at 1235-37). Complainant, though, testified that he

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[24] Capt. Herig explained that, as part of this order, Complainant was expected to sort the plastic from the other trash that was permitted to be disposed of overboard. (Tr. at 779, 958). Complainant told First Assistant Engineer Schilling that he was aware that this was the meaning of the order, but was concerned that other personnel might be confused by such an order if they were told to simply remove the trash from the engine room. (Tr. at 779, 958-60).

[25] Capt. Herig testified that he was reluctant to fire Complainant at first, as he believed that he was having a difficult time adjusting to the new supervisory position he was now in as a third assistant engineer. (Tr. at 715-16). He also believed that some of the tension and problems would be alleviated once some of the supervisors with whom Complainant had problems (specifically, First Assistant Engineer Schilling) were relieved and left the ship. (***See, e.g.***, Tr. at 964-965).

[26] Testimony revealed that the scratching out of the log book entries actually violated company policy. (***See, e.g.,*** Tr. at 112-13, 569, 790-93, 810-12, 1252-54).

observed Chief Engineer DePersis tossing these barrels into the ocean and he informed Capt. Herig of this alleged illegal activity. (***See*** Tr. at 741, 1236). Capt. Herig acknowledged that Complainant actually brought the garbage and barrel disposal orders to his attention prior to being fired, and that he fully investigated both of these concerns and determined that neither had any merit. (Tr. at 741, 778-79, 878, 958).

Complainant's employment on board THE MONSEIGNEUR was marked by numerous confrontations with his co-workers, supervisors and subordinates alike. (***See, e.g.,*** Tr. at 66-72, 270, 280-81, 348, 1264-70, 1323-27, 1410-13; ***see also*** Tr. at 715 (Capt. Herig testifying that Complainant "accosted" him "on several occasions"), 855-56, 1006). Chief Engineer Nye returned to the ship approximately two months after Complainant was hired, and almost immediately there were problems between the two.[27] (Tr. at 66, 270; ***see also*** Tr. at 968 (Capt. Herig stating that the March 20, 2000 incident occurred on Chief Engineer Nye's second day back on the ship)). These problems culminated in Complainant's being fired approximately three weeks later.

Complainant objected to the first work assignment he was given by Chief Engineer Nye on March 19, 2000, which consisted of chipping and painting work Complainant was asked to perform in his room while off duty.[28] (Tr. at 66-67, 265-66; RE 1). The next morning, on March 20, 2000, Complainant confronted Chief Engineer Nye in the engine room, telling him that he would not work for him anymore. (Tr. at 67, 155, 265; RE 1). At this time, Complainant also forcefully poked Chief Engineer Nye in the chest, and cursed him as well. (Tr. at 67). Complainant felt that this assignment violated the collective bargaining agreement due to the fact that he would be required to work off-duty.[29] (***See*** Tr. at 1285, 1294). Eventually, Chief Engineer Nye left the engine room and Complainant began his watch shift. (Tr. at 68).

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[27] Chief Engineer Nye and First Assistant Engineer Schilling both previously worked with Complainant aboard other AHL ships. (Tr. at 211, 1204). I note that there is no evidence in the record of any previous ill will between Complainant and either Chief Engineer Nye or First Assistant Engineer Schilling. In fact, Chief Engineer Nye remembered Complainant as a good worker. (Tr. at 267). However, Chief Engineer DePersis informed Chief Engineer Nye that Complainant was creating difficulties on the ship and was someone that should be watched when he rejoined the crew. (Tr. at 267).

[28] Chief Engineer Nye explained that this request was made in connection with a general on-ship improvement program designed to improve both the appearance of the ship to attract more customers, and the quality of the ship's living conditions. Chief Engineer Nye further explained that he asked Complainant to chip his room and, afterward, while Complainant was on watch, he would paint Complainant's room for him. (***See***, ***e.g.***, Tr. at 66-67, 69-70, 186, 256, 755-57).

[29] Complainant believes that Chief Engineer Nye and the QMEDs entered into a secret deal designed to circumvent the collective bargaining agreement, an accusation that Chief Engineer Nye vehemently denied, and one that I have found to have no support in the record. (Tr. at 171, 261, 399, 1267-68, 1287-88, 1298, 1323-24).

At around noon that same day, Complainant initiated a second confrontation with Chief Engineer Nye, this time in the mess deck. (Tr. at 68, 265-66, 968-76; RE 1). When Complainant entered the room, Chief Engineer Nye was sitting with Capt. Herig, First Mate Allen Lund, and a representative of Citgo Oil company, who, at the time, had chartered THE MONSEIGNEUR. (Tr. at 68, 272, 971; ALJ 20). Complainant entered in an agitated state and exclaimed that he was going to sit in the seat usually reserved for the first assistant engineer. (Tr. at 68, 974; ***see also*** Tr. at 742 (Capt. Herig describing Complainant as "extremely enraged"), 751-52 (Capt. Herig describing Complainant's demeanor as "hostile" and "agitated"); RE 1). Upon sitting down, Complainant hunched over the table and called Chief Engineer Nye a "son-of-a-bitch," and stated that he would not work for him. (Tr. at 68-69; ***see also*** Tr. at 974-75). After a few more minutes, Complainant left, followed by Capt. Herig, who went to speak to Complainant in his quarters, where he informed Complainant that his actions were unacceptable for an officer and that if he had a problem with a particular order, there were alternate means work out any problems. (Tr. at 69, 751, 753, 757, 974-75, 977-78).

After this particular incident and pursuant to company policy, Capt. Herig and Chief Engineer Nye wrote a warning letter to Complainant, which he received on March 21, 2000, describing the two yelling incidents, and particularly emphasizing the embarrassment the second incident caused due to the Citgo representative's presence. (Tr. at 69, 264, 270, 744; RE 1). The letter plainly informed Complainant that "[a]ny future display of this sort of behavior will result in [his] dismissal." (RE 1; Tr. at 271). Complainant was given the letter during a meeting with Capt. Herig and Chief Engineer Nye, where it was reiterated that his behavior in the mess hall was unacceptable. (Tr. at 272, 978-79). On March 29, 2000, though, Capt. Herig and Complainant had a "friendly conversation" where Complainant was assured that this second mess hall incident was in the past and that as long as he behaved in a manner befit of an officer, there would be no problems. (***See*** Tr. at 716).

Chief Engineer Nye testified that after Complainant received the letter, the working relationship between him and Complainant further deteriorated, and that many of his or the First Engineer's work orders to the engine room were directly countermanded by Complainant. (Tr. at 69-71, 127, 243-44, 318). Complainant routinely objected to Chief Engineer Nye's aforementioned special instructions to the QMEDs to paint the engine room at certain points in time while they were on watch in the engine room, and he would often pull the QMEDs off these assignments.[30] (Tr. at 70, 188, 276, 278, 290, 318, 852-53, 1382). Not only did Complainant contravene these painting orders given to the QMEDs, but he also refused direct assignments from Chief Engineer Nye. (Tr. at 278, 301, 350, 372-73). Chief Engineer Nye further testified that while on duty in the engine room, Complainant would spend a large portion, if not all, of his watch

[30] Complainant, however, did explain that the only time he objected to these instructions was when they directly interfered with the QMED's specific watch duties, as Complainant believed that the watch should take priority over the painting duties. (Tr. at 1383, 1388-89).

reading the safety manuals and taking notes rather than performing his maintenance rounds.[31] (***See, e.g.,*** Tr. at 76-77, 174, 243-44, 268-69, 301). First Assistant Engineer Bernie Fogg also expressed dismay over Complainant's work habits, as he told Chief Engineer Nye that "he wasn't happy with [Complainant]" because he was not "functioning as a third assistant should." (Tr. at 300; ***see also*** Tr. at 778-79, 861, 863 (Capt. Herig describing the problems First Assistant Engineer Schilling had with Complainant)).

Complainant's superior officers also testified that they received complaints from all of the QMEDs about Complainant. (***See, e.g.,*** Tr. at 915, 979-81, 987-88). Edgar Flores informed Chief Engineer Nye that Complainant directed racial slurs at him and requested that he no longer stand watch with Complainant.[32] (Tr. at 280, 292; RE 2). Chief Engineer Nye acquiesced and switched Mr. Flores' and Mr. Archangeles' shifts, although Mr. Archangeles was reluctant to do so, as he anticipated the same problems Mr. Flores experienced due to the fact that both are of the same ethnicity. (Tr. at 280, 293-94, 297). Additionally, Chris Hilley, the third QMED that worked in the engine room with Complainant, also requested to not work with Complainant after he accused Mr. Hilley of drinking on the job.[33] (Tr. at 295-97, 869-70). Chief Engineer Nye testified that Complainant's poor working relationship with the QMEDs made staffing the watches difficult, as two of the three QMEDs outright refused to work with Complainant. (***See also*** Tr. at 315; RE 6). Complainant would also regularly take his meals in the mess hall designated for non-officers, which displeased many of his shipmates. (***See*** Tr. at 252 (Chief Engineer Nye stating that the crew did not like Complainant, a member of management, eating with them in the crew's mess hall, and that once Complainant was escorted off the ship, a general sense of relief washed over the ship and its crew), 770-72 (Capt. Herig testifying that neither he nor the crew appreciated Complainant eating his meals with the crew and criticizing the other superior officers)).

On April 13, 2000, at approximately 8:00 or 8:30 a.m., Chief Engineer Nye determined that Complainant needed to be relieved of his duties, and met with Capt. Herig at approximately 9:00 or 9:30 that morning to inform him of this decision, which Capt. Herig agreed with. (Tr. at 57, 65-

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[31] Chief Engineer Nye explained that while all crew members were expected to be familiar with the safety manuals and to refer to them as needed, in-depth study and reading of the manuals was expected to be performed off duty so as not to interfere with the crew members' regularly scheduled duties. (***See*** Tr. at 176, 180-81, 300-01; CX 7; ***see also*** Tr. at 826-30).

[32] The relationship between Mr. Flores and Complainant deteriorated to the point that Mr. Flores allegedly threatened Complainant's life on one occasion. Chief Engineer Nye did not directly deny or corroborate this incident, but did testify that he learned of this near "the very end" of Complainant's employment. (Tr. at 388; ***see also*** Tr. at 912-13).

[33] At approximately midnight of one evening, when the watch was being changed, Complainant reported to Chief Engineer Nye that QMED Chris Hilley was "drunk and irrational and carrying on in the engine room." A search of his room by Chief Nye revealed no alcohol. Capt. Herig administered a Breathalyzer test to Mr. Hilley, which came back negative. After the incident, Mr. Hilley indicated that he did not want to work with Complainant. (Tr. 295-297).

66, 71, 130, 224, 304-07, 330, 471-72, 759, 763, 872, 989-90, 1016, 1082). Chief Engineer Nye concluded that Complainant's insubordination, his inability to peacefully work with his co-workers, and the overall poor quality of his work, especially after he received the warning letter in connection with the mess hall incident, warranted his dismissal. (Tr. at 70-71, 159-60, 224-25, 247, 301-03, 316, 337-38, 342; ***see also*** Tr. at 1080, 1087-88 (Capt. Herig testifying that he was afraid that Complainant's actions would lead to further turmoil and, possibly, a physical confrontation among the crew)). Chief Engineer Nye believed that Complainant's inability to perform his job and operate the engine room according to his duties and responsibilities as a third assistant engineer actually created the potential for health and safety problems. (***See*** Tr. at 71, 247, 301-03, 316, 337-38; ***see also*** Tr. at 482 (CEO Horner stating that Capt. Herig described Complainant as "insubordinate and disruptive") 981-89 (Capt. Herig testifying as to the problems Complainant had with following orders and with other ship personnel)). Overall, Chief Engineer Nye and Capt. Herig testified that the decision to fire Complainant was based upon a number of events and incidents that were either reported to them or that they observed. (***See, e.g.,*** Tr. at 57, 78, 243-44, 282-85, 290-91, 318, 833-34, 838, 987-88; CX 21G; RE 6, 9).

Chief Engineer Nye and Capt. Herig next called the main office sometime between 9:30 and 10:30 in the morning on April 13, 2000 to inform it that the decision had been made to fire Complainant, a decision with which CEO Horner agreed.[34] (***See, e.g.,*** Tr. at 599, 988-89). After this call, Chief Engineer Nye was instructed by Ken Keyser, pursuant to CEO Horner's instructions, to keep Complainant occupied until the ship reached port on April 14, 2000, which is when Complainant would be informed that he was fired and escorted off the ship.[35] (***See*** Tr. at 210-11, 224, 248, 306-07, 330-31, 334-35, 420-22, 472, 483, 814, 991; ***see also*** Tr. at 209-11, 383 (Chief Engineer Nye acknowledging that Complainant's assignments on April 14, 2000 were all "busy work"), 759, 763). These instructions were all pursuant to AHL policy concerning proper procedure to follow when dismissing an employee who is on a ship that is at sea. (Tr. at 210-11, 224, 335-36, 991-92; RE 9).

Later that day, between 11:00 and 11:30 a.m., also pursuant to CEO Horner's instructions, Chief Engineer Nye handed Complainant a stack of blank NCARs to determine what, in fact, Complainant had been documenting the times that he was seen taking notes while on watch duty. (Tr. at 130-31, 268, 307-08, 331, 422). Complainant filled out and submitted twenty-four NCARs to Capt. Herig on April 13, 2000 at approximately "one thirty, two o'clock in the afternoon." (Tr. at 128, 153-54, 1311; CX 3A. ***But see*** Tr. at 758, 762, 991 (Capt. Herig testifying that he received Complainant's NCARs at approximately six o'clock at night on April 13)). At eight o'clock that night, Chief Engineer Nye and Mr. Fogg met Complainant in the engine room at the beginning of his shift and Chief Nye requested that Complainant show him each of the areas

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[34] CEO Horner testified that he had recommended Complainant's immediate dismissal soon after learning about the second mess hall incident. (Tr. at 420-22).

[35] While Captain Downing typically handled personnel matters, he was out of the office that day and, thus, CEO Horner fielded the phone call from Captain Herig and Chief Engineer Nye. (Tr. at 420).

complained about in the NCARs.[36] (Tr. at 131, 1313; RU 3). After this inspection, Complainant was ordered, ***inter alia***, to clean a large tank in the bilge, which Complainant refused to do, as he felt it was improper since he was supposed to be on watch at that time and no replacement relieved him. (Tr. at 163-64, 334, 762, 1319-20).

Complainant was formally notified of his dismissal on April 14, 2000. (Tr. at 759, 1331). At approximately 9:30 or 10:00 p.m., slightly after the ship pulled into port in Wilmington, North Carolina, First Assistant Engineer Fogg relieved Complainant of his first watch, brought him to the captain's room, and informed Complainant that he was being fired. (Tr. at 1331). Complainant was also handed a termination letter, written that day by Chief Engineer Nye, explaining the basis for this decision, all of which centered on Complainant's "direct refusal to carry out proper orders." (Tr. at 333, 994, 1331; RE 7). While the letter misleadingly focused upon specific orders given to Complainant the previous night that he refused to perform, the last item cited Complainant's "constant countermanding of [Chief Engineer Nye's] direct orders" as well as the fact that his "constant behavior in the engine room is a disturbing influence on the entire engine department."[37] (RE 7; ***see also*** Tr. at 342-43, 760, 762-63, 993-94). Afterwards, Complainant was escorted off of the ship. (Tr. at 814, 831-32).

Arrangements were made for hiring a replacement for Complainant the day before, on April 13, 2000, after Capt. Herig and Chief Engineer Nye called the central AHL office. (Tr. at 248, 990-91; RU 27). Ms. Bourcq testified that AHL requested a third assistant engineer on the morning of April 13, 2000, and, when she inquired why, she was informed that AHL needed a replacement for Complainant. (Tr. at 1126-27, 1132-33, 1163, 1172-73; RU 27). After receiving this request, Ms. Bourcq sent a job order to the Port of Charleston to try to fill the vacancy as soon as possible. (Tr. at 1174; RU 28).

After leaving the ship, Complainant returned to his home in Florida, and while there, contacted the U.S. Coast Guard to report various problems aboard THE MONSEIGNEUR, complaints that mirrored those contained in the NCARs. (Tr. at 1334-35). After the Coast Guard investigated Complainant's allegations and found no deficiencies aboard THE MONSEIGNEUR, Complainant next contacted OSHA, alleging the same safety violations, whereupon the case

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[36] Chief Engineer Nye testified that, although he observed Complainant taking notes on yellow legal pads and taking photographs in the engine room, he did not find out what Complainant was complaining about until Complainant "officially notified" them of the nature of his complaints through the NCARs. (***See***, ***e.g.***, Tr. at 268).

[37] Chief Engineer Nye listed several orders that Complainant refused to obey in the April 14, 2000 termination letter, but explained that the decision to fire was not limited to these orders; rather, it was based upon Complainant's general inability to follow Chief Engineer Nye's orders, perform his job as a third engineer, and peacefully work with his co-workers. (Tr. at 76, 184-85, 223-25, 278-79, 342, 850-51; CX 21G; RE 6; ***see also*** Tr. at 940, 942, 944, 946-47, 987-88 (Capt. Herig testifying Complainant's behavior was unacceptable)).

proceeded in the manner described above. (Tr. at 404, 1338-39). In addition to contacting OSHA and the Coast Guard, Complainant contacted AHL on numerous occasions to express his continuing displeasure over being fired. (***See*** Tr. at 1514-39).

Complainant worked "a job and a half" amounting to sixty-two days in the maritime industry after AHL terminated him. (Tr. at 1180-81, 1332, 1373, 1459). Complainant stated that he worked for Weeks Marine for approximately two hitches amounting to sixty days, but left the second hitch early because he could "read the handwriting on the wall" and expected future problems with his employer over what he perceived to be inconsequential issues, namely Complainant's failure to display his license properly. (Tr. at 1182-83, 1459, 1504-06). Complainant also testified that he was about to be hired by the National Oceanic and Atmospheric Administration (hereafter "NOAA"), but, according to Complainant, "they basically found out about [this] lawsuit and that stopped that [the hiring process]." (Tr. at 1459). As a result, Complainant only worked two days for NOAA.[38] (Tr. at 1460). Thus, other than the sixty-two days of work for Weeks Maritime and NOAA, Complainant has not worked in the maritime industry since leaving AHL on April 14, 2000.[39] (Tr. at 1507-09). Complainant's other post-AHL employment has consisted of part-time employment in the auto auction business, providing him with a total income of approximately $3000.00 for 2000 and 2001, and "a couple of thousand" for 2002. (Tr. at 1510-11).

Although Complainant learned in November 2000 that his name was placed on a "do not hire" list used by AHL after he was fired pursuant to Article II, Section Five of the collective bargaining agreement between AHL and MM & P, he independently realized that future employment with the company would not occur, as the personnel department would not return his calls regarding prospective employment aboard AHL-owned ships. (Tr. at 1333; CX 32; ALJ 10A, 14; ***see also*** Tr. at 1373). CEO Horner explained that the decision to place Complainant's name on the "do not hire" list was made only after Complainant began to e-mail AHL, as CEO Horner was "somewhat alarmed" by the tenor of the e-mails. (Tr. at 551, 571-72; ***see generally*** Tr. at 596-603 (CEO Horner testifying that many of Complainant's e-mails contained inappropriate comments)). Ms. Bourcq further explained that each company maintained its own "do-not-hire" list, and that being on AHL's list would not, ***per se***, affect Complainant's ability to obtain work with other companies, although his name did appear on "do-not-hire" lists maintained by other employers in the industry. (Tr. at 1143-44, 1146).

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[38] Complainant stated that he worked about two days on board a ship for NOAA, and was asked to provide specific start and end dates regarding his work history to complete his employment application. (Tr. at 1460, 1462-63, 1482-83). Complainant did not have the exact dates, and he soon determined for himself that the job "wasn't going to work out," so he left the ship. (Tr. at 1460, 1482-83).

[39] Ms. Bourcq, who is responsible for filling all vacancies requested by maritime employers located in New Orleans, testified that while Complainant contacted her to see if she would be able to help him find job opportunities, he did not "aggressively pursue" employment through her. (Tr. at 1102-03, 1111-12).

Complainant was notified by letter dated November 30, 2000 that the General Executive Board of MM & P rejected his application for membership. (CX 21A; ***see also*** Tr. 622). MM & P President Timothy Brown (who is also on the executive board of ILO) testified that in making this decision, he relied upon a full investigation by Captain Higgins, the MM & P port agent for the Gulf, that concluded that Complainant's discharge was justified, and that his decision was also influenced by the "verbiage" in Complainant's post-firing correspondence. (Tr. at 625-26, 648-49, 657-58, 665-66, 671-72, 679, 681-82; CX 21A, CX 21D). In making the decision to reject Complainant's application for membership, Mr. Brown did not contact CEO Horner or anyone else from AHL, nor was he aware of the safety complaints Complainant had filed. (Tr. 658, 663). Mr. Brown further testified that Complainant was eligible to apply at the Union hiring halls for any jobs for which he was qualified, provided that the pertinent employer had not placed him on a "do not hire" list. (Tr. 625-26, 659-61). Complainant would also be free to reapply for membership with MM & P following his employment for 120 days.[40] (Tr. at 634, 641, 647-48).

DISCUSSION AND ANALYSIS

Applicable Law

As discussed above, the instant case has been brought under the employee protection provisions of six different environmental statutes (the CAA, the CERCLA, the WPCA, the SDWA, the SWDA, and the TSCA). These "whistleblower" provisions are designed to "protect employees from retaliation for protected activities such as complaining, testifying, or commencing proceedings against an employer for a violation of one of these federal statutes." ***Devereux v. Wyoming Association of Rural Water,*** 1993-ERA-18 (Sec'y, October 1, 1993).

The CAA's employee protection provision provides, in relevant part:

> **(a) Discharge or discrimination prohibited**
>
> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) --
>
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration of enforcement of any requirement imposed under this chapter or under any applicable implementation plan,

[40] However, Complainant was advised that given his past record of performance, he would be disqualified for future membership. (CX 21A, Tr. 624, 672).

> (2) testified or is about to testify in any such proceeding, or
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this Act.

42 U.S.C. § 7622 (emphasis added). Almost identical wording appears in this provision's counterpart in the SDWA at 42 U.S.C. § 300j-9(i), and the TSCA at 15 U.S.C. § 2622(a). A similar provision appears in the SWDA, stating that:

> No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any applicable implementation plan.

42 U.S.C. § 6971(a) (emphasis added). Similar language appears in the WPCA at 33 U.S.C. § 1367(a), and the CERCLA at 42 U.S.C. § 9610(a).

In applying these statutes to the facts before me, I note that, to the extent that there is a conflict among the Circuits, the law applied should most appropriately be that of the Fourth Circuit. In this regard, the alleged retaliatory action complained about by Complainant may be deemed to have occurred in Wilmington, North Carolina, where the Complainant was terminated.[41] As the site of the adverse action is North Carolina, appellate jurisdiction resides within the U.S. Court of Appeals for the Fourth Circuit.[42] ***See*** 15 U.S.C. § 2622(c)(1); 42 U.S.C. §§ 300j-9(i)(3)(A), 7622(c)(1). Thus, I am obligated to follow precedent established by that Circuit when it differs from that of the other Circuits or the Administrative Review Board (hereafter "ARB") (or, for earlier decisions, the Secretary of Labor). Additionally, the ARB and the Secretary of

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[41] While the decision to fire Complainant was made while THE MONSEIGNEUR was at sea, the actual termination was not implemented until Complainant was informed that he was fired and was escorted off THE MONSEIGNEUR when the ship reached port in Wilmington, North Carolina on April 14, 2000.

[42] I note that the WPCA states only that orders issued by the Secretary of Labor "shall be subject to judicial review in the same manner as orders and decisions of the Administrator are subject to judicial review under this chapter." 33 U.S.C. § 1367(b). The SWDA and the CERCLA contain identical provisions at 42 U.S.C. § 6971(b), 9610(b), but, like the WPCA, do not identify the proper venue in which to appeal a final decision in a case arising under the whistleblower provisions contained in each Act.

Labor have acknowledged that it is appropriate to consider cases involving other federal laws designed to protect employee rights, such as discrimination claims brought under Title VII of the Civil Rights Act of 1968. ***E.g.***, ***Martin v. Dept. of the Army***, 1993-SDW-1 (Admin. Review Bd., July 30, 1999).

To establish a ***prima facie*** case of a violation of the CAA's employee protection provision (which is analogous to the other environmental statutes), a complainant must show that he engaged in protected activity of which the respondent was aware and that the respondent took adverse action against him, and he must raise the inference that the protected activity was the likely reason for the respondent's adverse action against him. ***Tyndall v. U.S. Environmental Protection Agency,*** 1993-CAA-6 (Admin. Review Bd., June 14, 1996); ***Jackson v. Comfort Inn, Downtown,*** 1993-CAA-7 (Sec'y, Mar. 16, 1995). Temporal proximity may be sufficient to raise the inference that a respondent's adverse actions were taken in retaliation for a complainant's protected activities. ***Tyndall, supra***, ***citing Couty v. Dole,*** 886 F.2d 147, 148 (8th Cir. 1989). ***See also Simon v. Simmons Foods, Inc.,*** 49 F.3d 386, 389 (8th Cir. 1995).

Once an employee has established a ***prima facie*** case of discrimination, the respondent has the burden of producing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. The complainant, as the party bearing the ultimate burden of persuasion, must then show that the proffered reason was not the true reason, but was a pretext for retaliation. In this regard, the complainant always bears the burden of proving by a preponderance of the evidence that retaliation was a motivating factor in the respondent's actions. ***Jackson, supra.*** Once the employee has shown that illegal motives played some part in the discharge, the employer must prove that it would have discharged the employee even if he had not engaged in protected conduct. In such "dual motive" cases, the employer bears the risk that the influence of legal and illegal motives cannot be separated. ***Pogue v. U.S. Dept. of Labor***, 940 F.2d 1287 (9th Cir. 1991).

Preliminary Issues/Jurisdiction

Respondents have raised several preliminary issues that must be resolved prior to consideration of the merits of Complainant's cases. Specifically, issues regarding the timeliness of Complainant's initial complaint, as well as whether all of the named respondents are appropriate parties, must be addressed. Once these issues are resolved, the undersigned will turn to the merits of the claim.

1. Timeliness of Oral Complaint[43]

The record establishes that Complainant's initial oral complaint, made on or before May 4, 2000, was subsequently memorialized on May 4 by Mr. James Borders of the Occupational Health and Safety Administration (OSHA) and was filed within thirty days of the alleged retaliatory

[43] Timeliness is not an issue in Case Nos. 2001-CAA-0009 and 2001-CAA-0011.

activity; thus, it is timely according to the time period prescribed by the regulations. I now reaffirm my preliminary ruling to that effect.

Twenty-nine C.F.R. § 24.3(b)(1) requires all complaints brought under the employee protection provisions of the environmental statutes ". . . [to] be filed within 30 days after the occurrence of the alleged violation." ***See also*** 15 U.S.C. § 2622(b)(1); 33 U.S.C. § 1367(b); 42 U.S.C. §§ 300j-9(i)(2)(A), 6971(b), 7622(b)(1), 9610(b). Section 24.3 continues by stating that while no specific form of complaint is necessary, complaints "must be in writing" and should contain the pertinent facts underlying the alleged violation of the environmental statute in question. 29 C.F.R. § 24.3(c) (2001). While there are no specific pleading requirements articulated in any of the environmental statutes, a complaint must, at a minimum, allege that the employer's action giving rise to the claim was due to the employee's "engaging in activities protected under [the environmental statutes.]"[44] ***Roberts v. Rivas Environmental Consultants, Inc.***, 1996-CER-1 (Admin. Review Bd., Sept. 17, 1997).

The record shows that Complainant first contacted the Jacksonville, Florida OSHA office on or before May 4, 2000, at which point he communicated his desire to file a discrimination complaint against AHL. (ALJ 16). Mr. Borders informed Complainant that he would "file [the] discrimination complaint with the 11C RSI tonight via fax," and subsequently memorialized the complaint and forwarded it for further investigation. (***Id.***). Handwritten notations by Mr. Borders indicate that this complaint was forwarded to the appropriate office and ultimately assigned to the Tampa, Florida office on May 5, 2000. (***See id.***). While Complainant unquestionably did not comply with the writing requirement contained in 29 C.F.R. § 24.3, Mr. Borders remedied this once he memorialized Complainant's oral complaint.

In ***Dartey v. Zack Co. of Chicago***, 1982-ERA-2 (Sec'y, Apr. 25, 1983), the Secretary of Labor affirmed and adopted the administrative law judge's January 29, 1982 Decision Denying Motion to Dismiss in the same case. In ***Dartey***, the complainant orally complained to an OSHA employee, who subsequently memorialized the complaint. Decision Den. Mot. to Dismiss, at 2. In addressing whether the complainant's complaint should be dismissed, Judge Feldman noted that the express language of section 24.3 requires a written complaint, but nevertheless found the later OSHA memorandum of complainant's oral discrimination complaint complied with the regulatory requirement of a writing, "since it has been expressly held that where a claim must be filed in writing, a written memorandum filed by or for the recipient of a telephone call is sufficient." ***Id.*** at 5 (citing ***Firemen's Fund Insurance Co. v. Bergeron***, 493 F.2d 545 (5th Cir. 1974)).

The facts in the instant case are strikingly similar to those present in ***Dartey***, as Complainant conveyed an oral complaint to the Department of Labor within the appropriate time

[44] Complainant's concerns appear to only raise claims under the WPCA, the SWDA, the TSCA, and the CERCLA. In this regard, it appears that Complainant has not raised a colorable claim under the CAA or the SDWA, as he has not alleged that any of Respondent's actions had the potential of polluting the United States' air or drinking water.

period that was subsequently memorialized by OSHA staff.[45] There is no requirement that the employee actually file the complaint, as the regulations clearly state that an employee may have another individual file on the employee's behalf. 29 C.F.R. § 24.3(a) (2001); ***see also Dartey, supra***. Once Mr. Borders memorialized Complainant's complaint and forwarded it for further investigation, all prior filing deficiencies were remedied and, as such, I find that complainant's initial complaint was timely. I further find that there is good cause for Complainant's amended complaint to be accepted in lieu of the initial complaint, and it is so accepted. **SO ORDERED.**

2. Lack of Jurisdiction under Occupational Safety and Health Act

Complainant cites section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. § 660(c) in his amended complaint. (Amended Complaint ¶ 1). The Secretary of Labor has held that this tribunal lacks jurisdiction to hear cases filed under the employee protection provisions of section 11(c) of the OSH Act. ***Conaway v. Valvoline Instant Oil Change, Inc.,*** 1991-SWD-4 (Sec'y, Jan. 5, 1993); ***see also*** 29 C.F.R. § 24.1(a) (2001). Therefore, to the extent that Complainant is requesting relief pursuant to 29 U.S.C. § 660(c), I recommend that his claim under the OSH Act be dismissed with prejudice as to all parties. Likewise, there is no jurisdiction under any of the environmental statutes over whistleblower cases arising out of employee complaints about purely occupational hazards. ***See Stephenson v. NASA,*** 1994-TSC-5 (Admin. Review Bd., July 18, 2000).

3. Lack of Jurisdiction/Failure to State an Actionable Claim based upon Discovery Abuses

Complainant has failed to state a cause of action or establish a basis for jurisdiction under any of the Six Acts in Case No. 2001-CAA-0011, warranting dismissal of all of his claims in this case against all parties. That case is essentially a motion for sanctions against all of the above-captioned respondents for engaging in "hardball litigation tactics," and the action is summarily denied. ***See Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy***, 1998-CAA-10 and 11, 1999-CAA-1, 4 and 6 (Admin. Review Bd., Oct. 31, 2000) (recognizing that subject matter jurisdiction does not exist over claims alleging improper or unethical behavior by an attorney during the course of litigation). The only jurisdiction over such a claim would be in the context of Case No. 2000-CAA-0020 (with which Case No. 2001-CAA-0011 is now consolidated). In that case, I issued several pretrial Orders addressing a multitude of discovery issues. I note that while no party was entirely forthcoming during the early phases of discovery, no party was prejudiced by these early actions, as Complainant, AHL, and MM & P all presented very thorough cases at trial. To the extent that this claim is actually a motion for reconsideration regarding these previous rulings, it is denied. Because Complainant has failed to state a cause of action upon which I can

[45] While ***Dartey*** was an action brought under the Energy Reorganization Act (hereafter "ERA"), 42 U.S.C. § 5851, which has slightly different timing requirements than the environmental statutes involved in this action, all require that the initial complaint be in writing. As such, I find the ***Dartey*** decision particularly insightful.

grant relief, I recommend that all claims brought against Respondents in Case No. 2001-CAA-0011 be dismissed.

4. Failure to State a Claim against Individual Respondents/Lack of Jurisdiction over Individual Parties

As shown above, the CAA, SDWA, and the TSCA make it illegal for any "employer" to discriminate against any employee engaging in activities protected by these three Acts' whistleblower provisions, while the SWDA, WPCA, and the CERCLA make it illegal for any "person" to discriminate against any employee for the same reason. ***Compare*** 15 U.S.C. § 2622(a); 42 U.S.C. §§ 300j-9(i), 7622(a) ***with*** 33 U.S.C. § 1367(a); 42 U.S.C. §§ 6971(a), 9610(a). Part 24 of the Code of Federal Regulations, which implements all six of the environmental statutes, tracks the "employer" language used in the CAA, the SDWA, and the TSCA. 29 C.F.R. § 24.2(a) (2001).

The environmental statutes that use "employer" (the CAA, the SDWA, and the TSCA) do not specifically define the term. Case law establishes, though, that a strict employer-employee relationship is not required to invoke the employee protection provisions of these environmental statutes. ***See Williams v. Lockheed Martin Energy Systems, Inc.***, 1995-CAA-10 (Admin. Review Bd., Jan. 31, 2001); ***Stephenson, supra.*** Both the Secretary of Labor and the ARB have routinely found that entities "acting in the capacity of [an] employer with regard to a [complainant]" are liable for retaliation under the environmental statutes, and they have also held that if the respondent's actions were motivated by events that arose out of a previous employer-employee relationship, the entity may be liable despite the absence of an employer-employee relationship at the time the alleged retaliatory conduct occurred. ***See Williams***, ***supra*** (quoting ***Stephenson***, ***supra***). ***See also Delcore v. W.J. Barney Corp.***, 1989-ERA-38 (Sec'y, Apr. 19, 1995), ***aff'd sub nom., Conn. Light & Power Co. v. Sec'y of the U.S. Dept. of Labor***, 85 F.3d 89 (2d Cir. 1996) (holding that a former employee is an "employee" within the coverage of the ERA if the employer's retaliation arose out of a previous employer-employee relationship); ***Odom v. Anchor Lithkemko/International Paper***, 1996-WPC-1 (Admin. Review Bd., Oct. 10, 1997) (acknowledging that post-employment "blacklisting" is a form of retaliation). The "underlying question" is whether the respondent acted as an employer with regard to the complainant, "by exercising control over the production of the work product or by establishing, modifying, or interfering with the terms, conditions, or privileges of employment." ***Stephenson, supra*** (citing Apr. 7, 1997 Order); ***see also Varnadore v. Oak Ridge National Laboratories (Varnadore I, II, and III)***, 1992-CAA-2 to 1995-ERA-1 (Admin. Review Bd., June 14, 1996), ***aff'd sub nom.***, ***Varnadore v. Sec'y of Labor***, 141 F.3d 625 (6th Cir. 1998).

The SWDA, the WPCA, and the CERCLA, by comparison, prohibit "person[s]" from engaging in discriminatory conduct.[46] Case law suggests that liability should only extend to those

[46] The SWDA defines "person" as "an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political

that were party to, or interfered with, an employee-employer relationship involving a complainant, ***i.e.*** those subject to liability under the CAA, the SDWA, and the TSCA, as the purpose of all the environmental whistleblower provisions is to protect employees "from the debilitating threat of employment reprisals" for engaging in protected activity. ***See R.I. Dept. of Environmental Mgmt. v. United States***, 304 F.3d 31, 37 (1st Cir. 2002); ***Passaic Valley Sewerage Commissioners v. U.S. Dept. of Labor***, 992 F.2d 474, 478 (3d Cir.), ***cert denied***, 510 U.S. 964 (1993).[47] However, no such limitation appears in the SWDA, the WPCA, and the CERCLA and, thus, these three statutes seemingly contemplate a broader class of suable entities.

It is through this lens that I will now consider whether all of the above-captioned respondents are appropriately named parties to these actions.

Claims Against AHL under Case No. 2001-CAA-0009

While it is undisputed that AHL is appropriately named as a party to Case No. 2000-CAA-0020, Complainant has failed to prove that AHL is a properly named party in Case No. 2001-CAA-0009. Regarding Case No. 2001-CAA-0009, Complainant has done little more than allege a "joint-employer" relationship between AHL and MM & P. While the ARB recognizes a joint-employer theory of liability, it is a complainant's burden to prove that the alleged joint-employer "acted" as an employer. ***See***, ***e.g.***, ***Williams, supra***; ***Varnadore, supra***.

Testimony at the hearing shows that MM & P had no input whatsoever regarding Complainant's employment and does not support a finding that the two entities were joint employers. MM & P is a union that represents all of the workers aboard AHL vessels, as well as those aboard other vessels. (Tr. at 111-12, 431, 621-22, 652). At the time Complainant worked for AHL, the company was jointly owned by the MM & P Pension Fund and the IRAP fund, which are both employee benefit plans recognized under the Employee Retirement Income Security Act. (Tr. at 423, 431, 561; CX 4). Both CEO Horner and Mr. Brown testified that the MM & P Pension Fund and IRAP fund are independently administered by an independent fiduciary located

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subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States." 42 U.S.C. § 6903(15). The WPCA and the CERCLA contain similar definitions. ***See*** 33 U.S.C. § 1362(5); 42 U.S.C. § 9601(21).

[47] Courts interpreting the whistleblower provisions in the SWDA and WPCA have used the terms person and employer interchangeably. ***See R.I. Dept. of Environmental Mgmt. v. United States***, 304 F.3d 31, 37 (1st Cir. 2002) (stating that the SWDA "contains a whistleblower provision that prohibits an employer from firing or otherwise discriminating against an employee who initiates or testifies in a proceeding brought pursuant to the Act"); ***Simon v. Simmons Foods, Inc.***, 49 F.3d 386 (8th Cir. 1995) (noting the "person" language in the SWDA and WPCA, but explaining that, to establish a ***prima facie*** retaliation case under either Act, a complaint must show that the employer had knowledge of the protected activity); ***Passaic Valley Sewerage Commissioners v. U.S. Dept. of Labor***, 992 F.2d 474, 478 (3d Cir.), ***cert denied***, 510 U.S. 964 (1993) (comparing the WPCA to other whistleblower provisions and noting that all are designed to prevent employer intimidation).

in Washington, DC, not by MM & P itself, and at no point has the Union directly or indirectly involved itself in any decision affecting AHL's management or daily operations. (***See*** Tr. at 431-32, 563, 649-51). Mr. Brown emphasized that the MM & P Pension Fund and IRAP fund do not in any way serve the same role or function as a labor organization. (***See*** Tr. at 649). Mr. Brown further testified that MM & P has never maintained any ownership interest in AHL, and that he, as MM & P president, has never exerted any control over AHL's business operations. (Tr. at 649-50).

Complainant has also failed to establish that AHL controlled the actions taken by the union in not accepting Complainant as a member. Any action by AHL in this regard is limited to its firing of Complainant and its decision to place Complainant on the list of persons that it would not rehire. Complainant has failed to establish that AHL otherwise participated in the union's failure to accept him as a member, but even if he were to make such a showing, he would be merely complaining of activities that naturally flowed from AHL's decision to terminate him. At most, such an allegation would relate to possible damages based upon alleged "blacklisting." Such a claim would thus fall within the purview of Case No. 2000-CAA-0020. Accordingly, the claims brought against AHL in Case No. 2001-CAA-0009 should be dismissed.

Claims Against Lincoln Nye, Bob Schilling, Michael C. Herig, Timothy A. Brown, and James T. Hopkins

All claims against Capt. Michael C. Herig, Chief Engineer Lincoln Nye, First Assistant Engineer Bob Schilling, MM & P International President Timothy A. Brown, and MM & P International Secretary/Treasurer James T. Hopkins should be dismissed to the extent that they were brought against these respondents in their individual capacities. None of these named respondents were served in their individual capacities, and former First Assistant Engineer Schilling was not served in any capacity, as he was no longer employed by AHL when the complaint was served upon it. The remaining respondents were only served in their official capacities when their employers were served.

Further, I recommend that all five of the individual respondents be dismissed as parties in any capacity. In this regard, Complainant has not proved that any of these individuals may be considered an "employer" as that term is used in the CAA, the SDWA, and the TSCA. ***See Stephenson, supra.*** While liability may potentially exist under the broader language ("person") contained in the SWDA, the CERCLA, and the WPCA, any discriminatory actions undertaken by these individuals should be imputed to their employers, irrespective of the particular environmental statute. ***Cf. Lissau v. Southern Food Services, Inc.,*** 159 F.3d 177 (4th Cir. 1999) (finding individual supervisors not liable under title VII.)

Preliminarily, I note that Capt. Herig, Chief Engineer Nye, and First Assistant Engineer Schilling were dismissed from the action at the hearing in their personal capacities, but I reserved judgment on the issue of whether they should be dismissed in their official capacity as officers of

AHL until Complainant had an opportunity to submit his position to this tribunal.[48] (Tr. at 8-10). Complainant has not shown that these individuals acted in any capacity other than as Complainant's supervisors, acting within the scope of their employment with AHL, Complainant's employer. Their liability should be imputed to AHL. ***See generally Lissau, supra*** As AHL is the proper party respondent, I recommend that Capt. Herig, Chief Engineer Nye, and First Assistant Engineer Schilling be dismissed as parties.

Likewise, Mr. Brown and Mr. Hopkins should be dismissed. Complainant has done little, if anything, to advance his claim that Mr. Brown or Mr. Hopkins should be liable in their individual capacities under the environmental statutes. In this regard, he has failed to show that they exercised power, control, or authority over terms and conditions of employment, or controlled the manner of employment. ***See Stephenson, supra.*** Further, any discriminatory actions undertaken by these individuals should be imputed to their employer, MM & P, irrespective of the particular environmental statute Complainant is seeking relief under. ***See generally Lissau, supra.*** As MM & P is a party to this action, and as Mr. Brown and Mr. Hopkins acted within the scope of their employment, I find no reason for them to remain parties in any capacity, and I recommend that all claims against them be dismissed.[49]

Claims Against ILA

All claims brought against ILA should be dismissed. While Complainant has named ILA as a respondent in Case No. 2001-CAA-0009, presumably under some vague "joint-employer" theory, he has failed to assert facts that would give rise to liability under such a theory. Moreover, he has failed to establish that ILA itself undertook, or contributed to any decision by MM & P to undertake, any discriminatory action towards Complainant. ***See Stephenson***, ***supra***. In view of Complainant's failure to show why ILA should be a party to this action, I recommend that all claims brought by Complainant against ILA be dismissed.

Claims Against MM & P

While the claims brought under the CAA, the SDWA, and the TSCA should clearly be dismissed against MM & P, there is arguably a basis for distinguishing the claims arising under the SWDA, the WPCA, and the CERCLA. Complainant has not proved that MM & P is an "employer" within the meaning of the CAA, the SDWA, or the TSCA. Moreover, as discussed above, he has also failed to establish a "joint employer" relationship, warranting the dismissal of these claims. As also noted above, the SWDA, the WPCA, and the CERCLA use the term "person," which arguably recognizes a broader class of respondents. ***But see Williams, supra***. Based upon the case law and the regulations, it appears that all of the claims under the

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[48] This issue was not raised regarding Mr. Brown and Mr. Hopkins.

[49] In light of the foregoing rulings, it is unnecessary to address Respondents' argument that the individuals named by Complainant should be dismissed for due process reasons. (***See*** Tr. at 8-10).

environmental statutes should be dismissed against MM & P on the same basis. However, as reasonable minds might differ on this issue (***see Williams, supra*** (Brown, dissenting)), the merits of the claims brought against MM & P under the SWDA, the WPCA, and the CERCLA will be addressed below.[50]

5. Remaining Causes of Action and Parties

In sum, the only remaining claims associated with Case No. 2000-CAA-0020 are those brought under the environmental statutes[51] against AHL, and the only claims remaining in Case No. 2001-CAA-0009 are those seeking relief under the SWDA, the WPCA, and the CERCLA against MM & P.

Merits of Complainant's Discrimination Claims

Complainant's remaining claims should be dismissed, as a careful evaluation of all of the evidence and pleadings submitted in connection with the above-captioned claims shows that while he engaged in protected activity, he has not proved that this protected activity served as an impetus either for AHL's decision to terminate him, or for MM & P's rejection of his membership request.

1. Case No. 2000-CAA-0020

Complainant Engaged in Protected Activity

Since this case was fully tried on the merits, it is not necessary to determine whether Complainant presented a ***prima facie*** case. ***See***, ***e.g.***, ***Carroll v. Bechtel Power Corp.***, 1991-ERA-46, at 6 (Sec'y, Feb. 15, 1995), ***aff'd sub nom Bechtel Corp. v. U.S. Dept. of Labor***, 78 F.3d 352 (8th Cir. 1996); ***Creekmore v. ABB Power Systems Energy Services, Inc.***, 1993-ERA-24 (Sec'y, Feb. 14, 1996). Once a respondent has produced evidence that a complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, it no longer serves any analytical purpose to answer the question whether the complainant presented a ***prima facie*** case. Instead, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of liability. ***See Reynolds v. Northeast Nuclear Energy Co.***, 1994-ERA-47, at 2 (Admin. Review Bd., Mar. 31, 1997); ***Boschuk v. J&L Testing, Inc.***, 1996-ERA-16, at 3, n.1 (Admin. Review Bd., Sept. 23, 1997); ***Eiff v. Entergy Operations, Inc.***, 1996-ERA-42 (Admin. Review Bd., Oct. 3, 1997).

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[50] The dissent in ***Williams***, which arose under all six of the environmental statutes, suggested that the term "person" in the SWDA, the WPCA, and the CERCLA could be interpreted more broadly.

[51] It appears that Complainant only states a cause of action against AHL under the WPCA, the SWDA, the TSCA, and the CERCLA. See footnote 44 above.

Notwithstanding the above, identification of the protected activity is a "crucial first step" in whistleblower claims, as subject matter jurisdiction exists only if the complainant is alleging that a party illegally retaliated against him for engaging in an activity protected by the environmental statutes' whistleblower provisions. ***See Melendez v. Exxon Chemicals Americas***, 1993-ERA-6 (Admin. Review Bd., July 14, 2000), ***appeal dismissed***, No. 60569 (5th Cir. July 30, 2002); ***Rockefeller v. U.S. Dept. of Energy***, 1998-CAA-10 (Admin. Review Bd., Oct. 31, 2000). As a result, I must determine whether Complainant engaged in a protected activity and, if so, determine whether AHL's dismissal of Complainant was motivated by such activity.

The record establishes that Complainant engaged in protected activity when he submitted the twenty-four NCARs to his superior officers. The Six Acts make it illegal to retaliate against an employee if the employee engaged in protected activities, including the commencing, testifying in, assisting in, or participating in proceedings for the enforcement of requirements imposed by one or more of the Six Acts. ***See*** 15 U.S.C. § 2622(a); 33 U.S.C. § 1367(a); 42 U.S.C. §§ 300j-9(i), 6971(a), 7622(a), 9610(a); 29 C.F.R. § 24.2(b). To receive the benefits of the environmental whistleblower protections, an employee need only raise a complaint that "touches upon" an environmental concern. ***Kahn v. Commonwealth Edison Co.,*** 1992-ERA-58 (Sec'y, Oct. 3, 1994). An employee may benefit from these protections if the protected activity consists of the filing of an internal complaint with an employer. ***E.g.***, ***Passaic Valley Sewerage Commissioners***, 992 F.2d at 478; ***Dodd v. Polysar Latex,*** 1988-SWD-4 (Sec'y, Sept. 22, 1994); ***Hermanson v. Morrison Knudsen Corp.***, 1994-CER-2 (Admin. Review Bd., June 28, 1996); ***Carson v. Tyler Pipe Co.***, 1993-WPC-11 (Sec'y, Mar. 24, 1995).[52]

To be considered a protected activity, a complaint must be "grounded in conditions constituting reasonably perceived violations of the [Six Acts]." ***Jones v. EG & G Defense Materials, Inc.***, 1995-CAA-3 (Admin. Review Bd., Sept. 29, 1998) (citations omitted); ***see also Tucker v. Morrison & Knudson***, 1994-CER-1 (Admin. Review Bd., Feb. 28, 1997); ***Hermanson v. Morrison Knudsen Corp.***, 1994-CER-2 (Admin. Review Bd., June 28, 1996). The ARB has determined that complaints concerning worker health or safety that "touch on public safety and health, the environment, and compliance with the [Six Acts]" constitute protected activity. ***Scerbo v. Consolidated Edison Co.***, 1989-CAA-2 (Sec'y, Nov. 13, 1992), ***quoted in Jones***, ***supra***. When examining such a complaint, the finder of fact should employ a reasonableness test, focusing on whether the employee possessed a good faith, reasonable belief that the alleged health or safety violation would impact the environment at the time he or she made the complaint. ***See***

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[52] The Circuit Courts are almost unanimous in finding that internal complaints are protected activity under the ERA's whistleblower provisions, which are analogous to those found in the Six Acts. ***Bechtel Construction v. Sec'y of Labor***, 50 F.3d 926 (11th Cir. 1995); ***Couty v. Dole***, 886 F.2d 147, 148 (8th Cir.1989); ***Jones v. Tennessee Valley Authority***, 948 F.2d 258 (6th Cir. 1991); ***Kansas Gas & Electric Co. v. Brock,*** 780 F.2d 1505 (10th Cir. 1985), ***cert. denied***, 478 U.S. 1011 (1986); ***Mackowiak v. University Nuclear Systems, Inc.,*** 735 F.2d 1159 (9th Cir. 1984). ***But see Macktal v. U.S. Dept. of Labor***, 171 F.3d 323 (5th Cir. 1999) (holding that internal complaints are not protected activity under the ERA) (citing ***Brown & Root v. Donovan***, 747 F.2d 1029 (5th Cir. 1984)).

Stephenson v. NASA, 1994-TSC-5 (Admin. Review Bd., July 18, 2000); ***Nathaniel v. Westinghouse Hanford Co.***, 1991-SWD-2 (Sec'y, Feb. 1, 1995); ***Minard v. Nerco Delamar Co.***, 1992-SWD-1 (Sec'y, Jan. 25, 1994). In addressing the outer limits of this "reasonableness" test, the ARB stated in ***Minard*** that while

> . . . it is unlikely that an employee could successfully show that it was reasonable for him to have complained about . . . the environmental effects of spilled milk . . . a complainant should be given the opportunity to demonstrate that it was reasonable, under the specific circumstances of the case, to believe that a given action on the part of the employer created an environmental hazard in violation of one of the [Six Acts].

Minard, ***supra***, slip op. at 5 n.6. Thus, as the ARB indicated in ***Minard***, although a complaint may at first glance appear to fall outside the scope of protected activities, a complainant should be given the opportunity to show that his or her concerns "touch upon" concerns targeted by the Six Acts.

Preliminarily, Complainant appears to allege that previous, oral complaints communicated to his supervisors motivated, in part, the decision to terminate him. These complaints include his concerns about trash and barrel disposal, the operation of the ballast pump, and various conditions that were corrected. However, he has not established a causal nexus between these complaints and his termination. The NCARs memorialized some of these prior oral complaints.

Complainant himself acknowledged that many of the items forming the basis of his NCARs were no longer problems at the time he re-reported them via the NCAR submission process. ***See, e.g.,*** CX 19 (indicating that several of the NCARs [CX 3A, at 5, 6, 7, 15, 16, 20, and 21] reported conditions that were addressed before they were filed). All Six Acts mandate a dismissal of claims premised upon the employee-complainant's deliberate violation of the environmental statutes. 29 C.F.R. § 24.9 (2001). ***A fortiori,*** a claim for relief cannot be based upon an employee's assertion of health and safety concerns that the employee knows do not currently exist. To hold otherwise would be to invite disgruntled employees to file frivolous claims.

While some of Complainant's complaints allege general health and safety concerns and routine maintenance issues, or deal with conditions that do not exist, he has nonetheless asserted sufficient viable environmental concerns in the NCARs to establish that he engaged in protected activity. Initially, I find that Complainant filed his internal complaints with a good faith, reasonable belief that some of these items could potentially affect the environment. Complainant is a very experienced maritime employee, as he began working aboard ships similar to THE MONSEIGNEUR in 1979. During the course of his employment, Complainant has become acutely aware of the potential dangers that chemical and oil tanks pose to the environment if these ships are not operated carefully. Complainant testified that several former employers experienced accidents that he attributed to unsafe conditions aboard the ship prior to the accidents. (***See***, ***e.g.***,

Tr. at 1188-91, 1193-96, 1198-1201, 1353-54). Additionally, within three weeks of being hired, Complainant witnessed an oil line burst in the pump room, resulting in oil being sprayed over the room and into the bilge area. Complainant also testified that prior to this incident, he was surprised at several other conditions aboard the ship, including what he perceived as the intentional bypassing of a sanitation device used to purify sewage to allow for safe discharge into the ocean. After witnessing these conditions, he was determined to maintain his watch in a careful manner to ensure that the condition of the ship would not deteriorate to a level that would endanger the environment.

The twenty-four NCARs are the end result of Complainant's vigilant watch.[53] As discussed, several of the NCARs are rejected outright, as they are reporting items that Complainant knew had been corrected before he filed the NCARs. Others are not actually directed towards conditions that could reasonably be considered to be potentially harmful to the environment, or solely concern workplace safety, even after they are afforded a generous reading. These include the NCARs citing the following: the complaint about the log book entries being scratched out (CX 3A, at 17), improper welding techniques (CX 3A, at 8), broken pipe brackets and uninsulated pipes (CX 3A, at 3, 9, 10, 11, 12, 14), and the alleged death threat Complainant received from another co-worker (CX 3A, at 24). (***See also*** CX 19).

However, I find that at least some of the remaining NCARs cite conditions that could potentially affect the environment, whether directly or by potentially causing the ship to run aground. The clearest examples are the complaints alleging improper use of the marine sanitation device and illegal barrel discharge at sea. (CX 3A, at 18 and 22). While I am a bit skeptical that these activities actually took place, based upon Capt. Herig's testimony, the validity of the underlying complaint is not the focus of the protected activity analysis. ***See Minard***, ***supra***. However, even if these items, which Capt. Herig fully investigated and determined to have no merit, are discounted, the remaining items are of sufficient significance to allow Complainant to fall within the whistleblower provisions in the Six Acts. (CX 3A, at 1, 2, 4, 13, 19). I note that while these items may not pose environmental dangers alone, when viewed in the aggregate, they reflect conditions that could potentially contribute to a situation in which the environment is harmed. The importance that all systems and machinery be in working order is underscored by the fact that THE MONSEIGNEUR is an oil tanker, a work environment that requires a heightened concern for safety, as even the most innocuous of problems could pose a credible risk to the environment if left unattended.

In sum, while many of Complainant's complaints do not assert conditions that could reasonably lead to an environmental hazard, Complainant has met his burden in proving that he engaged in protected activity, affording him the protections contained in the whistleblower provisions applicable to this action.

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[53] By acknowledging Complainant's sincerity with respect to some of the concerns raised in the NCARs, I am not suggesting that his repeated countermanding of his superiors' orders based upon alleged safety concerns was justified or even truly motivated by safety concerns.

Complainant Was Not Subjected to Adverse Action For Engaging in Protected Activity

While Complainant engaged in protected activity, his claims in Case No. 2000-CAA-0020 should be dismissed, as the record establishes that the actual decision to fire him was made and implemented prior to Complainant submitting these NCARs to his superiors, and he has failed to show a causal nexus between his initial raising of these concerns and his termination. Furthermore, AHL has established that its decision to fire Complainant was motivated solely by legitimate, nondiscriminatory reasons.

As discussed above, to prevail on a whistleblower complaint, an employee must establish that the respondent took adverse employment action because the employee engaged in protected activity, and the causal relationship may be established by temporal proximity. Unquestionably, Complainant's discharge is an adverse action that could be compensable under the Six Acts. However, the temporal proximity between Complainant's filing of his NCARs and his termination – which I found a sufficient nexus to defeat AHL's summary decision motion – vanishes upon closer examination.

AHL offered extensive testimony concerning Chief Engineer Nye's decision to fire Complainant, and, by all accounts, this decision was reached on the morning of April 13, 2000, well before Complainant submitted his internal complaints to Capt. Herig. (Tr. at 57, 65-66, 71, 130, 224, 304-07, 330, 471-72, 759, 763, 872, 989-90, 1016, 1082). Complainant contends that the decision to fire him was actually made on April 14, 2000. However, as Chief Engineer Nye's and Capt. Herig's testimony show, the decision to fire Complainant was clearly made the day before, as were all the necessary steps to procure a replacement for Complainant, and this decision was only effectuated the night of April 14, 2000 once the ship arrived at the Wilmington, North Carolina port. Moreover, Capt. Herig and Chief Engineer Nye were following company policy in not informing Complainant that he was fired the moment the decision was made, as policy dictates that employees are only informed of such personnel decisions after the ship they are working on arrives at port. (Tr. at 210-11, 224, 334-36, 991-92). Ms. Bourcq's testimony that AHL contacted her on April 13, 2000 and asked her to find a replacement third assistant engineer further corroborates Chief Engineer Nye's and Capt. Herig's testimony that Complainant was effectively fired prior to filing his NCARs. (Tr. at 1126-27, 1132-33, 1163, 1172-73; RU 27, 28). Finally, CEO Horner stated that after Chief Engineer Nye and Capt. Herig informed him of their decision to terminate Complainant, a decision he agreed with, they were instructed to provide Complainant with NCARs for him to fill out.

The testimony and evidence therefore make it is clear that there was no causal relationship between the decision to fire Complainant and his protected activity. The decision to fire Complainant was made on the morning of April 13, 2000. It was only after that decision was made that Complainant submitted his NCARs to his superiors, which was done at the request of CEO Horner. AHL, through Complainant's supervisors, could not have had any knowledge of Complainant's protected activity, as all the NCARs were submitted after the decision to terminate Complainant was made and after steps were undertaken to find a replacement for him. Although

Complainant alleged that he voiced complaints cognizable under the Six Acts earlier in the voyage (such as his complaints, recorded in the log book, concerning instructions for the disposal of trash at sea), there has been no showing that these prior incidents played any part in his firing.[54]

Furthermore, AHL submitted ample evidence to support a finding that a legitimate, non-discriminatory basis existed to support its decision to terminate Complainant, namely his routine insubordination and his inability to work peacefully with his co-workers at any level. In this regard, the single incident occurring on March 20, 2000 in the officer's mess hall, when Complainant confronted Chief Engineer Nye in the presence of a customer's representative, would have been a sufficient basis for firing him.[55] That incident involved plans to chip and paint Complainant's quarters and did not concern any environmental or safety issues. Although Complainant was given a warning as a result of that incident, he continued to be insubordinate, frequently ignoring Chief Engineer Nye's orders. Moreover, Complainant had difficulty working with the other engine room personnel, and two of the three QMEDs assigned to work for Complainant refused to work with him – also a valid basis for his termination.[56] Complainant has failed to show that the articulated legitimate, non-discriminatory basis for his firing was a mere pretext. Rather, the evidence shows that the articulated, legitimate reason was the true reason.[57]

I would be remiss if I did not note at this point that the record before me reflects that Respondent AHL and its officers (and specifically, CEO Horner, Capt. Herig and Chief Engineer Nye, each of whom provided credible testimony before me) were committed to the safe operation of THE MONSEIGNEUR, and that it was run in a highly professional manner, with due regard for

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[54] The incident involving trash and the log book concerned First Assistant Engineer Schilling, who did not participate in the decision to fire Complainant. (Tr. 966). As noted above, he was replaced by Bernie Fogg as the voyage progressed, as part of the normal rotation. (Tr. 956).

[55] Capt. Herig offered to fire Complainant for disrespect after the March 20 incident but Chief Engineer Nye said he would rather "write him a letter of warning and try to work things out." (Tr. 977 to 979). Capt. Herig testified that Complainant had been disrespectful to him prior to that incident. (Tr. 958). He described Complainant as "[a] guy with an anger problem, disrespectful, really with no regard for seniors in the vessel." (Tr. 967).

[56] In addition to Chief Engineer Nye and the QMEDs, the previous chief engineer (Scott Depersis) and the previous first assistant engineer (Bob Schilling) had difficulty getting along with him, and the other first assistant engineer (Bernie Fogg) criticized his work. Chief Engineer Nye described him as "disrupting the whole operation of the engine room." (Tr. 71).

[57] It is troubling that the letter given to Complainant explaining why he was fired included reference to his failure to perform busywork assigned to him after the decision was made to fire him. (RE 7). However, based upon the credible evidence adduced at trial (discussed above), I find that Complainant's failure to perform the busywork played no part in his termination.

applicable safety and environmental standards. In fact, Complainant did not at any time raise a safety or environmental concern that was not treated seriously by Respondent.[58]

Finally, Complainant's claims that AHL illegally "blacklisted" him by placing his name on their "do not hire" list should be dismissed, as the same reasons that support AHL's decision to fire Complainant justify this action as well, especially when coupled with the vituperative communications Complainant sent to AHL after being terminated. This evidence more than supports AHL's decision to place Complainant's name on its "do-not-hire" list pursuant to the collective bargaining agreement, and this allegation should be dismissed as well.

In short, Complainant has failed to establish that any of AHL's actions towards him were prompted by the protected activity he engaged in. Accordingly, I recommend that all claims against AHL in Case No. 2000-CAA-0020 be dismissed.

2. Case No. 2001-CAA-0009

As discussed above, the claims brought against AHL, ILA, and all of the individual respondents named in Case No. 2000-CAA-0009 have been dismissed, as well as the claims brought under the CAA, the SDWA, and the TSCA against MM & P. Thus, the only remaining claims related to this action are those brought against MM & P under the SWDA, the WPCA, and the CERCLA, and these claims should be dismissed as well, as Complainant has not shown that he was subject to any adverse employment action as a result of his protected activity.

Preliminarily, Complainant alleges the same protected activity in this action as he did in Case No. 2000-CAA-0020, and, for the same reasons discussed above, I find that Complainant has engaged in protected activity.

The SWDA, the WPCA, and the CERCLA recognize a broad spectrum of activities that could qualify as adverse action, provided that a complainant proves by a preponderance of the evidence that the alleged retaliatory action touches upon an "employee's compensation, terms, conditions, or privileges of employment." 29 C.F.R. § 24.2(a) (2001). Again, merely alleging that a privilege of employment is affected is not enough, as Complainant must prove that such a condition was affected. ***See Trimmer v. U.S. Dept. of Labor***, 174 F.3d 1098 (10th Cir. 1999).

Complainant has not proved that MM & P (or Mr. Brown or Mr. Hopkins, in their official capacities) illegally retaliated against him for a number of reasons. Complainant argues that he was wrongfully ejected from MM & P "in direct retaliation for filing" the NCARs. However, testimony and documentary evidence reveal that Complainant was only an "applicant" for union membership

[58] For example, Complainant's allegation that a QMED was under the influence of alcohol led to a prompt search of the QMED's quarters and a Breathalyzer test. Although Respondent conducted regular safety meetings, Complainant failed to attend them upon the unfounded assumption that his concerns would not be addressed.

but, whether or not this nomenclature is accepted, it is clear that he was denied full union membership based upon established procedures.[59] (***See*** Tr. at 622-24 (MM & P President Timothy Brown testifying that Complainant was an "applicant" at the time MM & P informed him that his application for union membership was rejected); CX 21A, 21D; RE 11, 12; RU 24, 25. ***But see*** Tr. at 1333 (Complainant believed he was "kicked out of the union.")) Mr. Brown explained that even though the AHL collective bargaining agreement states that all officers on board an AHL ship shall become union members after thirty-one days, to become a full union member as a licensed engineer in the offshore division, the division encompassing AHL's employees, Complainant would have to work a single one-hundred-twenty-day assignment without incident and, further, his application for membership would have to be accepted by the union's General Executive Board. (***See*** Tr. at 635-36, 656. ***See also*** Tr. at 1140-42, 1144; ALJ 10A, at art. 1, § 3; CX 21A). Mr. Brown further testified that while Complainant's most recent application for membership into MM & P was denied and that future employment with AHL is unlikely, he could still use the MM & P hiring halls and could apply for jobs posted by MM & P, although Complainant's name may appear on other "do-not-hire" lists circulated by other former employers. (***See*** Tr. at 625-26, 660-61; CX 21D; RE 12; ***see also*** Tr. at 1110, 1143). While undoubtedly Complainant's employment prospects were somewhat affected by his failure to secure union membership, it does not constitute the type of adverse employment action contemplated by the environmental statutes.

Assuming, ***arguendo,*** that MM & P's rejection of Complainant's application may be considered an adverse action cognizable under any of the environmental statutes, Complainant has failed to prove that it was motivated by his protected activity. To the extent that the decision was contributed to by AHL's firing of him, I have already found no causal nexus between the protected activity and his firing, for the reasons set forth above. Mr. Brown testified that he did not discuss the decision to reject Complainant's then-pending membership application with CEO Horner or anyone else at AHL. Rather, Mr. Brown relied upon Captain Higgins' determination that Complainant's discharge was justified, made after a full investigation was conducted, coupled with the tone of Complainant's post-firing correspondence. (Tr. at 648, 658, 663, 665-66, 671; CX 21D). Mr. Brown further testified that he was not aware of the safety complaints Complainant filed when the decision to reject his application for membership was made. (Tr. at 647-48). As noted above, the union's action was consistent with established procedures and I find no evidence that it was motivated by Complainant's protected activity.

In short, Complainant has utterly failed to prove by a preponderance of the evidence that MM & P, or any of its employees, undertook any adverse employment action against him. Additionally, he has failed to show that the action complained about – his membership application rejection – was motivated by his alleged protected activity. As a result, Complainant has failed to

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[59] The record shows that Complainant was previously a member of the unlicensed division of MM & P between 1991 and 1999. (Tr. at 639, 654; ***see also*** ALJ 13). While testimony did not reveal why Complainant's membership ended, documentary evidence shows that his membership was suspended on April 1, 1999 for failure to pay dues. (RU 20). Complainant then re-registered as an applicant on January 11, 2000. (RU 20).

meet an essential element of his claim. I therefore recommend that his claim against MM & P in Case No. 2001-CAA-0009 be dismissed.

ORDER

IT IS HEREBY RECOMMENDED that the complaints in these matters be **DISMISSED**.

PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. ***See*** 29 C.F.R. §§ 24.7(d) and 24.8.